

1 **RIMAC MARTIN, P.C.**
2 WILLIAM REILLY SBN 177550
3 GRANT INGRAM SBN 242785
4 1051 Divisadero Street
5 San Francisco, CA 94115
6 Telephone: (415) 561-8440
7 Facsimile: (415) 561-8430

8 Attorneys for Defendant
9 LOOKSMART LTD.

10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**

13 WEBOOST MEDIA S.R.L., a Societa a) Case No.: 3:13-cv-05304 SC
14 responsabilita limitata,)

15 Plaintiffs,

16 v.

17 LOOKSMART LTD., a Delaware)
18 corporation, and DOES 1 through 100,)

19 Defendants.)
20)
21)
22)
23)
24)
25)
26)
27)
28)

) **REPLY IN SUPPORT OF**
) **DEFENDANT'S MOTION TO**
) **DISMISS AND FOR PARTIAL**
) **SUMMARY JUDGMENT**

) Date: June 6, 2014
) Time: 10:00 a.m.
) Loc: Courtroom 1, 17th Floor

1

2

4

5

6

1 responsible for generating the "click-fraud" traffic at issue." Complaint ¶22.

2 Further, the Original Complaint alleged:

3 WeBoost is informed and believes and based thereon
4 alleges that the source of substantially all of this "click
5 fraud" traffic was LookSmart, itself. Substantially all of
6 the fraudulent clicks generated on www.pay-it-less.co.uk
7 can be traced directly to traffic originating from websites
8 owned and controlled by LookSmart. Moreover,
9 LookSmart has a strong financial incentive to generate
10 click fraud traffic due to the fact that the amount it bills
11 WeBoost is based upon the number of clicks generated
12 on its websites. The more traffic LookSmart generated
13 for We Boost, legitimate or otherwise, the more money it
14 received.

11 Complaint ¶ 21.

12 Despite WeBoost's claims to the contrary, no new facts have been alleged.
13 These purported new "click fraud" allegations are merely a repackaging of the
14 same old "click fraud" allegations. Certainly, no new facts have been alleged that
15 WeBoost's claims are not subject to the economic loss rule.

16 For all the reasons stated by the Court in the February 28, 2014 Order,
17 LookSmart respectfully requests that the Court grant this motion and dismiss with
18 prejudice WeBoost's negligence and intentional interference, fraudulent
19 concealment, and UCL claims.

20 **III. WEBOOST'S TORT CLAIMS ARE BARRED BY THE**
21 **ECONOMIC LOSS RULE**

22 This Court held that "the economic loss rule, in summary, "is that no tort
23 cause of action will lie where the breach of duty is nothing more than a violation of
24 a promise which undermines the expectations of the parties to an agreement."
25 Oracle USA, Inc. v. XL Global Services, Inc., C 09-00537 MHP, 2009 WL
26 2084154, at *4 (N.D. Cal. July 13, 2009). This rule serves to prevent every breach
27 of a contract from giving rise to tort liability and the threat of punitive damages:

1 "Quite simply, the economic loss rule prevents the law of contract and the law of
2 tort from dissolving one into the other." Robinson Helicopter Co. v. Dana Corp.,
3 34 Cal. 4th 979, 988 (Cal. 2004) (internal quotation marks and brackets omitted).
4 Limiting recovery to contract damages makes it easier for parties to "estimate in
5 advance the financial risks of their enterprise." Freeman & Mills, Inc. v. Belcher
6 Oil Co., 11 Cal. 4th 85, 106 (Cal. 1995) (quoting Applied Equip. Corp. v. Litton
7 Saudi Arabia Ltd., 7 Cal. 4th 503, 515 (Cal. 1994)); Foley v. Interactive Data
8 Corp., 47 Cal. 3d 654, 694 (Cal. 1988). As a result, the rule is particularly
9 applicable when a party alleges "commercial activities that negligently or
10 inadvertently [went] awry." Robinson Helicopter, 34 Cal. 4th at 991 n.7. However,
11 the economic loss rule can still bar fraud and other intentional tort liability if those
12 claims do not arise independently of the breach of contract claims. See *id.* at 990."
13 February 28, 2014 Order 9:12-10:5.

14 "[A] party alleging fraud or deceit in connection with a contract must
15 establish tortious conduct independent of a breach of the contract itself, that is,
16 violation of 'some independent duty arising from tort law.'" *Food Safety Net*
17 *Services* 209 Cal.App.4th 1118, 1130.

18 WeBoost has not and cannot allege claims that arise independently of the
19 breach of contract. WeBoost knew that a "percentage of click fraud is considered
20 unavoidable and tolerated within the on-line pay-per-click advertising industry."
21 Complaint ¶ 16, FAC ¶ 16. WeBoost also knew that LookSmart maintained its
22 own network of affiliate websites, which it used to display advertisements from
23 other companies in order to generate revenue and that LookSmart acted both as
24 publisher and intermediary. *Id.* ¶ 8.

1 With this knowledge, WeBoost entered into a contract (“T&C” – FAC
2 Exhibit A) to post WeBoost’s advertisements on LookSmart’s network of websites
3 and to pay LookSmart on a "pay-per-click" basis. *Id.* ¶ 7. These two sophisticated
4 parties reached a bargain allocating the risks of doing business, expressly including
5 provisions for “click fraud” in the T&C and a provisions that displace tort duties
6 with regard to LookSmart’s obligations under the contract.

7 The T&C establishes that the pay-per-click “charges will be determined
8 solely based on LookSmart’s click tracking technology.” *See* FAC Ex. A, Pg. 3
9 Section C, “All Accounts”. Furthermore, the T&C contemplates challenging the
10 pay-per-click charges that are invoiced by LookSmart and has a reconciliation
11 system in place to do so. *Id.* WeBoost did not utilize the reconciliation system.
12 Instead, it filed this action and alleged that LookSmart was billing WeBoost “for
13 illegitimate ‘click-fraud’ traffic.” *See* FAC ¶ 39.

14 The illegitimate pay-per-click charges allegation forms the basis of
15 WeBoost’s breach of contract claim. *Id.* Furthermore, this same allegation of
16 illegitimate pay-per-click charges, which WeBoost calls “click-fraud”, is the basis
17 of every cause of action stated by WeBoost. *See* Complaint ¶¶ 46, 49, 53, 60, 67,
18 70, 74, and 78. Every cause of action arises from the same allegation of breach of
19 contract via illegitimate pay-per-click charges. WeBoost calls this “click-fraud” in
20 an attempt to dissolve the law of contract and the law of tort into the other.
21 *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 988.

22 WeBoost’s tort claims should be dismissed because:

- 23 1. WeBoost’s claims do not arise independently of the breach of contract
24 claims;
- 25 2. all WeBoost’s claims arise from Defendant's obligations under the T&C,
26 and the parties bargained for the possibility of all the issues alleged in
27 this action; and

1 3. LookSmart's obligation to monitor and charge for pay-per-click traffic
2 arose exclusively from the contract.

3 WeBoost has not and cannot plead facts stating claims that are not subject to
4 the economic loss rule. Accordingly, LookSmart respectfully requests that
5 WeBoost's tort claims be dismissed with prejudice.

6 **IV. THE COURT SHOULD ENTER A PARTIAL SUMMARY**
7 **JUDGMENT LIMITING LOOKSMART'S LIABILITY**

8 This Court ruled that "regardless of whether Plaintiff is ultimately able to
9 recover on a tort or contract claim, Section 8 would cap Plaintiff's damages to the
10 amount it paid under the contract." February 28, 2014 Order 13:13. Based upon
11 that ruling, the T&C and the fact that Plaintiff has pleaded that Plaintiff paid
12 Defendant \$105,273.92, LookSmart respectfully requested that the Court issue a
13 partial summary judgment order limiting WeBoost's recovery, if any, to an amount
14 less than or equal to \$105,273.92.

15 WeBoost opposed the motion by claiming that there is no "statutory basis
16 for a summary judgment order limiting damages." Opp. 7:12. WeBoost is
17 incorrect.

18 Federal Rule of Civil Procedure Rule 56 (a) provides that upon a showing
19 that there is no genuine dispute of material fact as to particular claim(s) or
20 defense(s), the court may grant summary judgment in the party's favor on "each
21 claim or defense—or *the part of each claim or defense*—on which summary
22 judgment is sought." (emphasis added); see *Beal Bank, SSB v. Pittorino* (1st Cir.
23 1999) 177 Fed.3d 65, 68; *Wang Laboratories, Inc. v. Mitsubishi Electronics*
24 *America, Inc.* (CD CA 1993) 860 F.Supp. 1448, 1450. Rule 56(a) explicitly
25 provides for summary judgment on "*part of each claim or defense*." One of
26 LookSmart's defenses is that its liability is limited by the T&C. The Court has a
27 statutory basis to make such a ruling.

1 **V. CONCLUSION**

2 Based upon the foregoing, LookSmart respectfully requests that the Court
3 dismiss with prejudice WeBoost's causes of action for Fraudulent Concealment,
4 Negligent Interference With Prospective Economic Advantage, Intentional
5 Interference With Prospective Economic Advantage, Intentional Interference With
6 Contractual Relations and Violation of Cal. Bus. & Prof. Code § 17200, and issue
7 a partial summary judgment order limiting WeBoost's recovery, if any, to an
8 amount less than or equal to \$105,273.92.

9
10 **RIMAC MARTIN, P.C.**

11 Dated: May 23, 2014

By: /s/ William Reilly

12 WILLIAM REILLY
13 Attorneys for Defendant
14 LOOKSMART LTD
15
16
17
18
19
20
21
22
23
24
25
26
27

1 **CERTIFICATE OF SERVICE**

2 I am employed in the County of San Francisco, State of California. I am over the
3 age of 18 and not a party to the within action. My business address is 1051 Divisadero
4 Street, San Francisco, California 94115.

5 On May 23, 2014, the following document is being filed electronically and will be
6 available for viewing and downloading from the Court's CM/ECF system:

7 ***REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND FOR***
8 ***PARTIAL SUMMARY JUDGMENT***

9 The Notice of Electronic Case Filing Automatically generated by the system and
10 sent to all parties entitled to service under the Federal Rules of Civil Procedure and the
11 Local Rules of the United States District Court, Northern District of California, who have
12 consented to electronic service shall constitute service of the filed document to all such
13 parties.

14 Executed on May 23, 2014 at San Francisco, California.

15 I declare under penalty of perjury that I am employed in the office of a member of
16 the bar of this Court at whose direction the service was made and that the foregoing is
17 true and correct.

18 Robin A. Hale
19 (Type or print name)

20 /s/ Robin A. Hale
21 (Signature)